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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:

Amendment of Section 90.75(c)(10)
of the Commission's Rules and
Regulations to Permit Private
Carrier Paging Licensees
to Provide Service to Individuals

RM-8017

REPLY COMMENTS OF PAGEMART, INC.

PageMart, Inc. ("PageMart"), by its attorneys, hereby submits its reply to the comments on the petition for rulemaking submitted by the Association for Private Carrier Paging ("APCP") Section of the National Association of Business and Educational Radio, Inc. ("NABER").¹

INTRODUCTION AND SUMMARY

In addition to PageMart, three parties filed comments on the NABER proposal for relaxation of the eligibility restrictions imposed on private carrier paging ("PCP") operators.² All of the comments strongly support revising the eligibility restrictions to authorize PCP operators to serve individuals who do not otherwise qualify as "business eligibles." As the parties recognize, the current eligibility restrictions no longer serve any useful regulatory purpose, are inconsistent with Congressional policy of providing private radio services to the

¹ Petition for Rule Making of the Association of Private Carrier Paging of the National Association of Business and Educational Radio, Inc., RM-8107 (June 4, 1992). By Public Notice released June 23, 1992 (Rep.No. 1897), the Commission requested comments on the NABER petition within 30 days.

² See 47 C.F.R. Section 90.75(c)(10).

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largest feasible number of end-users, and have resulted in anticompetitive abuses and a "chilling effect" on the provision of authorized private carrier services. The Commission should therefore initiate a rulemaking proposing to relax the Section 90.75(c)(10) eligibility restrictions as soon as possible. In addition, Telocator urges the Commission to initiate a second proceeding to investigate the regulatory treatment of private and common radio carriers on the grounds that lifting the eligibility restrictions somehow "blurs the distinction" between the two. While the Commission may decide that it is appropriate to review the regulatory treatment of private and common carriers, relaxing the eligibility restrictions for PCP operators does not require it to do so. PageMart supports Telocator's statement that such a review, if it is deemed necessary, should be separate from the issues presented by the NABER petition.

II. THE BUSINESS ELIGIBILITY RESTRICTION LIMIT HAS DISCOURAGED COMPETITION IN THE PAGING MARKET AND HAS ENCOURAGED ANTICOMPETITIVE ABUSES

As PageMart and the other parties demonstrated in their opening comments, the business eligibility restrictions serve no regulatory purpose and, in fact, have caused anticompetitive and spectrum-inefficient consequences.³ The vagueness of the "business purpose" requirement has produced a chilling effect on the provision of PCP services to eligible users. Paging Network, Inc. ("PageNet") noted in its comments that the eligibility requirement creates significant disincentives for PCP operators to provide service to certain eligible end-users, in particular those who purchase their equipment through retail or reseller

³ Comments of PageMart, Inc. at 4; Comments of Paging Network, Inc. at 10; Comments of PacTel Paging at 3-4.

outlets.⁴ Indirect distribution channels are an increasingly popular means of selling paging equipment yet, as PageMart emphasized, the risks created by the eligibility restrictions preclude PCP operators from utilizing this marketing tool effectively.⁵ The restrictions limit the marketing channels available to PCP operators and shrink the potential market to include only those end-users willing to take the extra effort to seek out PCP equipment vendors. As a consequence, the business purpose requirement goes beyond merely preventing sales to "ineligibles"; it also discourages sales to "eligibles".

Parties also argue correctly that the retention of the eligibility restriction has limited competition in the paging markets by discouraging the efficient use of the limited spectrum.⁶ PageNet correctly notes that expanding the eligibility criteria to include individuals will promote new system design, technology, and marketing techniques that will maximize the development of the PCP spectrum.⁷ PacTel Paging points out that relaxing the eligibility restrictions will have beneficial effects in markets where the common carrier spectrum is crowded, as well as in more remote markets where it has not been economical to serve the limited "business purpose" market.⁸ As explained by Telocator and PageNet, the demand for

⁴ Comments of PageNet at 10.

⁵ As PageMart noted in its Comments, the ambiguity in the "business purpose" restrictions has created a marketing environment that is conducive to anticompetitive abuse by common carrier providers. See Attachment 2 of Comments of PageMart, Inc.

⁶ Comments of PageMart at 6; Comments of PageNet at 11; Comments of PacTel Paging at 2-3.

⁷ Comments of PageNet at 11.

⁸ Comments of PacTel Paging at 2-3.

non-business paging services is growing rapidly,⁹ yet it is unlikely that this demand can be met solely by the current Part 22 common carriers. PCP operators provide a realistic and efficient alternative in congested urban markets, as well as a new and innovative service in more rural areas. By retaining these restrictions the Commission is discouraging the development of viable competition and the benefits that will flow from it. The parties all agree that it is in the public interest to expand the eligibility for PCP services to include service to individuals.

II. RELAXING THE ELIGIBILITY RESTRICTIONS IS CONSISTENT WITH CONGRESSIONAL AND COMMISSION POLICY AND WILL NOT BLUR THE DISTINCTION BETWEEN PRIVATE AND COMMON CARRIERS

In light of its earlier decision to lift the eligibility restrictions for Specialized Mobile Radio providers¹⁰ and the 1982 amendments to Section 332 of the Communications Act, the Commission must lift the restrictions for PCP operators or articulate a rational, record-based reason for application of a different rule to private paging. As the Comments of both PageMart and PageNet demonstrate, the Commission failed to meet this burden when it rejected its own proposal to relax the eligibility restrictions for PCP operators on grounds that were inconsistent with its prior 1988 SMR decision.¹¹ In order for the Commission lawfully to continue the eligibility limitations for PCP operators, it must articulate some policy justification upon which it can base a decision to apply different eligibility rules to SMR and PCP services.

⁹ Comments of Telocator at 1-2; Comments of PageNet at 7.

¹⁰ Amendment of Part 90, Subparts M and S, of the Commission's Rules, Report and Order, 3 FCC Rcd. 1838 (1988), ("SMR Eligibility Order").

¹¹ Comment of PageMart at 10; Comments of PageNet at 12.

In addition, Section 332 of the Communications Act, added by the 1982 amendments to the Act passed by Congress, explicitly directs the Commission to promote a number of important policies in its spectrum management actions for private mobile radio services, including providing services "to the largest feasible number of users."¹² Both PageMart and PageNet point out that the amendment allows the Commission to add, modify, or delete services from the private land mobile systems category, provided that it acts within the guidelines of Section 332(a), without removing them from their private carrier classification.¹³ Relaxing the eligibility restrictions and allowing PCP operators to serve individuals is necessary to effectuate Congress's goal in enacting Section 332. As described above and in the comments of the other parties, the current restriction not only limits individuals from obtaining PCP service, it also acts as a barrier to users who do qualify under the "business purpose" definition yet are prevented from obtaining the service by the unreasonable marketing constraints that necessarily flow from the restriction. As a result of the restriction, PCP services are available to fewer rather than more end-users. This result is directly contrary to both the language and the purpose of Section 332(a).

Finally, Telocator urges the Commission to institute a separate proceeding to eliminate what it believes are "the remaining regulatory disparities between private and common carrier paging providers."¹⁴ While the Commission may decide that it is appropriate to institute a separate investigation into the regulatory treatment of private versus

¹² 47 U.S.C. Section 332(a)(4).

¹³ Comments of PageMart at 7; Comments of PageNet at 13.

¹⁴ Comments of Telocator at 3, note 3.

common carriers, relaxing the end-user eligibility restrictions does not mandate such a review. The Commission should not delay implementing the important Part 90 changes proposed by the NABER petition while it considers Telocator's additional request to review the differing regulatory treatment of private and common carriers. Instead, the Commission should deal with Part 90 on its own terms and, if necessary, consider the regulatory treatment of private versus common carriers in a subsequent proceeding.

Telocator's request is based on its belief that eliminating the eligibility restrictions for PCP operators will "blur" the distinction between private and common carriers, so that there is no meaningful purpose served by maintaining separate regulatory treatment for private and common carriers. However, the distinction between private and common carriers is not based on who the customer is, but rather, how that customer is served. Indeed, the Commission has expressly found that the distinction between private and common carriers is not "blurred" by the elimination of eligibility restrictions.¹⁵ Even without this distinction, it is well within the Commission's authority to regulate "like" carriers differently, provided that it articulates a rational basis for its distinction. For example, the Commission historically has differentiated between dominant and non-dominant interexchange carriers, subjecting the dominant carrier to more stringent regulations than it does the non-dominant carriers, despite little to no differences in the services offered or the technologies utilized. For the same reasons, the Commission may continue to regulate Part 90 carriers differently than it does Part 22 common carriers.

¹⁵ SMR Eligibility Order, at para. 25.

III. RELAXING THE ELIGIBILITY RESTRICTIONS WILL ALLOW PCP OPERATORS TO MEET THE COMMUNICATIONS NEEDS OF INDIVIDUALS

All of the comments demonstrate that individuals have a significant need for the services offered by PCP operators, yet they are precluded by the eligibility restrictions from satisfying these needs. As the demand for paging services has increased, and the spectrum available become more congested, PCP operators have competed by developing specialized services and pricing arrangements that, given the eligibility restrictions, individuals are denied access to.¹⁶ PageMart's comments list five separate needs that support the expansion of PCP eligibility,¹⁷ and the other parties' comments similarly argue that individuals are demanding the new services that are available from PCP operators but are prevented by the business purpose restriction from obtaining them.¹⁸ Expanding eligibility would produce public interest benefits of increased competition, added service options, and lower prices for individual users of paging service. These are goals that the Commission has sought to encourage throughout the telecommunications industry, and can encourage in the paging industry by relaxing the end-user eligibility restrictions.

¹⁶ Comments of PageNet at 7.

¹⁷ Comments of PageMart at 11-14.

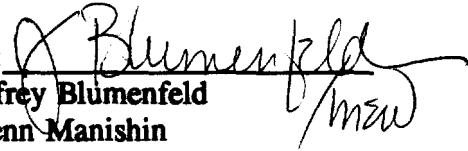
¹⁸ Comments of PageNet at 7-8; Comments of PacTel Paging at 3; Comments of Telocator at 2.

CONCLUSION

All of the parties filing comments in response to the Commission's Public Notice support the petition for rulemaking. The Commission should grant the petition and promptly implement NABER's proposal expanding eligibility for private carrier paging services to include non-business individual use.

Respectfully submitted,

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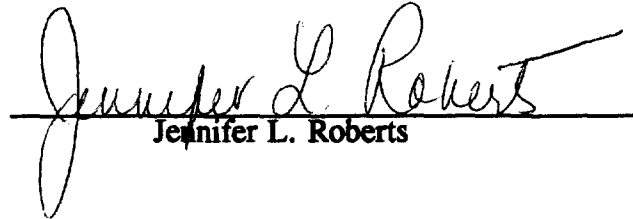
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August 7, 1992

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CERTIFICATE OF SERVICE

I, Jennifer L. Roberts, do hereby certify on this 7th day of August, 1992, that I have served a copy of the foregoing **REPLY COMMENTS OF PAGEMART, INC.** via first class mail, postage prepaid, or via hand delivery to the parties listed below.


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